

Office of the Attorney General
State of Tennessee

*1 Opinion No. 96-144
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Agreement to keep unlisted telephone numbers confidential

Senator D.E. Crowe, II
Suite 6A, Legislative Plaza
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QUESTION

May an emergency communications district, organized under Tenn. Code Ann. §§ 7-86-101, et seq., furnish names and addresses of unlisted telephone number holders to the public, even where, in order to obtain the numbers, the district has signed a confidentiality agreement with a local telephone provider?

OPINION

Unlisted telephone numbers, in the custody of the district, are public records that the agency must make available for public inspection and copying during business hours unless otherwise provided by state law. No such exemption in state law, either by statute or under the Tennessee Constitution, exists. Similarly, release of this information would not violate any federal statute or any provision of the United States Constitution. An agreement by a governmental agency to restrict public access to public records that are not exempt under state law violates public policy and is unenforceable. Thus, the district must make these records available for personal inspection and copying by any citizen of the State.

ANALYSIS

Your question concerns the authority of an emergency communications district organized and operating under Tenn. Code Ann. §§ 7-86-101, et seq. This statutory scheme authorizes a city or county to create an emergency communications district to establish and operate an emergency communications service using the digits 911. Tenn. Code Ann. §§ 7-86-105 & -107. A district created under this statutory scheme is a "municipality" or public corporation and a "body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes." Tenn. Code Ann. 7-86-106.

To finance the service, the board of directors is authorized to levy an emergency telephone service charge on service users throughout the district. Tenn.

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Code Ann. § 7-86-108. The service supplier--usually, the telephone company providing phone service within the district--bills and collects this service charge to service users--usually, telephone customers in the district. Tenn. Code Ann. § 7-86-108(d). The company must remit the service charge funds to the district. Tenn. Code Ann. § 7-86-110. Either the service supplier or the board of directors may demand payment from a service user who fails to pay a proper service charge and may terminate service to such user. *Id.* The service supplier bills the district for 911 service that the supplier may provide the district. The statute authorizes the board of a district to "subscribe to the appropriate telephone services from the service supplier." Tenn. Code Ann. § 7-86-107(c).

You ask whether a district may furnish the names and addresses of unlisted telephone number holders to the public, even where, in order to obtain the numbers, the district signed an agreement with a local telephone provider agreeing to keep the numbers confidential. Thus, presumably, disclosing the numbers would violate the district's contract with the telephone provider.

***2 State law provides:**

(a) All state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law. Tenn. Code Ann. § 10-7-503(a) (emphasis added). Tenn. Code Ann. § 10-7- 506 provides that one who has a right to inspect public records has the right to take extracts or make copies of them, and to make photographs or photostats of them while they are in the possession of their lawful custodian, subject to "reasonable rules." This statutory scheme is often referred to as the Public Records Act. In this statute, "the Legislature unequivocally stated its intention to open governmental activity to public scrutiny" *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn. 1994). Under the Act, if documents have been made or received in connection with the transaction of official business by any governmental agency, then a presumption of openness exists, and the governmental agency has the burden to justify non-disclosure. *Id.* at 684. The *Memphis Publishing Co.* case makes clear that a public record is presumed open in the absence of a specific exception.

The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991). As noted above, an emergency communications district is a "municipality" and a public corporation. Such a district is therefore a governmental agency, and any record it made or received in connection with its official business would be a public record open to inspection unless otherwise provided by state law. Custody and release of 911 records are further discussed in Op. Tenn. Atty. Gen. **93-65** (November 29, 1993) and Op. Tenn. Atty. Gen. U95-088 (October 19, 1995).

Presumably, the district obtained the telephone numbers in implementing its statutory duty to create an emergency telephone service within the district. Unlisted telephone numbers in the custody of an emergency communications district are therefore public records subject to public inspection unless otherwise provided by state law. No state statute makes such records confidential. You

indicate that the district, in order to obtain the telephone numbers from the phone company, signed a contract agreeing not to disclose the unlisted numbers. The Tennessee Supreme Court, interpreting § 10-7-503, has stated that the General Assembly's enactments on public records express this State's public policy on this subject. See *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513, 516 (Tenn. 1986). Thus, it is the public policy of this State for public records to be open for inspection unless otherwise provided by state law. By entering into an agreement to restrict access to public records for which no statutory exemption is available, the district would be attempting to create a new exemption from the Public Records Act. Such a contract is against public policy. Courts will decline to enforce a contract if the contract violates state law, provides for doing something that is contrary to statute, or harms the public good. *Mattox v. Loretto Financial Services*, No. 01-A-01- 9307-CV-00308 (Tenn. Ct. App. filed Dec. 14, 1994). Accordingly, a contract by an emergency communications district to refuse to disclose unlisted telephone numbers in its custody is unenforceable.

*3 If a state law conflicts with a federal law, either because compliance with both state and federal law is impossible, or because state law frustrates the purposes and objectives Congress expressed in the federal law, the state law is preempted under the Supremacy Clause of the United States Constitution. See, e.g., *Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). Federal law places some restrictions on release of unlisted telephone numbers by a telephone company. But it is not necessary to address whether these restrictions would preempt the Public Records Act because no federal restriction appears to apply directly to an emergency communications district. E.g., 47 C.F.R. § 51.27(c)(3)(iii) (FCC regulation applicable to "local exchange carrier" but not to an emergency communications district). Research has disclosed no other federal statute or regulation that would require the district to keep the numbers confidential.

This Office has concluded that the Public Records Act, as applied to a particular fact situation, may be unconstitutional. Op. Tenn. Atty. Gen. 87-4 (January 9, 1987). Thus, the Public Records Act would not require public access to a record if granting access would violate a right protected under the Tennessee or United States Constitution. See Op. Tenn. Atty. Gen. 96-027 (February 28, 1996) (constitutional right to a secret ballot is an exception to the Public Records Act). The question remains, then, whether the Tennessee or United States Constitution would prohibit a public agency from providing public access to unlisted telephone numbers in its custody because allowing access would violate a constitutionally protected right.

Courts in other states have differed on whether an individual has a "reasonable expectation of privacy" in an unlisted telephone number or other information under the Fourth Amendment to the United States Constitution sufficient to require law enforcement officials to procure a warrant to obtain it. Compare *People v. Chapman*, 679 P.2d 62 (Cal. 1984) (California constitution protected defendant's reasonable expectation of privacy in unlisted name, address, and telephone number, so that seizure by the police of the information without a warrant, consent, or exigent circumstances was unreasonable and violated the state constitution) & *Saldana v. State*, 846 P.2d 604 (Wyo. 1993), rehearing denied (1993) (obtaining an individual's name and telephone records through unlisted number was not a "search"

requiring a warrant because the defendant had no legitimate expectation of privacy in the information). In those cases, law enforcement officials obtained information from a private phone company. By contrast, this opinion addresses release of public records that are already in the custody of a governmental agency.

Both the Tennessee and the United States Constitution protect individual privacy rights. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993); *Bellotti v. Baird*, 443 U.S. 622 (1979). As applied, the right of privacy has been limited in its protection to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty, for example, activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973). The Sixth Circuit Court of Appeals has also held that the United States Constitution does not encompass a general right to privacy or reputation that would make the publication of private information a constitutional violation. *J.P. v. Desanti*, 653 F. 2d 1080, 1088-89 (6th Cir. 1981) (post-adjudication dissemination of social histories of juvenile offenders did not violate offenders' federal constitutional right to privacy). In *Desanti*, the Court stated that safeguards regarding non-disclosure of private information "must be left to the states or the legislative process." *Id.* at 1090-91; accord, *Cline v. Rogers*, 87 F.3d 176 (6th Cir. 1996) (no federal constitutional right to privacy in individual's criminal record; Tennessee law does not recognize a private cause of action for violations of the Tennessee Constitution). No other available Tennessee or federal case indicates that releasing an individual's unlisted telephone number under these circumstances would rise to the level of a constitutional violation. As a result, under the Public Records Act, unlisted telephone numbers and related names and addresses received by an emergency communications district in connection with the transaction of its official business must be open for personal inspection by any citizen of Tennessee during business hours. The agency also must make the records available for copying, "subject to reasonable rules."

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